In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1517

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Mississippi rendered on January 10, 1979.

OPINION BELOW

The decision of the Supreme Court of Mississippi is reported at 365 So.2d 947 and is appended hereto as Appendix "A".

JURISDICTION

The decision of the Supreme Court of Mississippi was entered on January 10, 1979. This petition for a writ of certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the change from appointment by the Board of Aldermen to election by the qualified electors of three members of a five-member Board of Trustees of a local school district in Mississippi is covered by Section 5 of the Voting Rights Act of 1965, as amended.

2. Whether the change from election at-large to election by supervisors' districts of two members of a five-member Board of Trustees of a local school district in Mississippi is covered by the Voting Rights Act of 1965, as amended.

3. Whether a decree of a State Chancery Court in Mississippi is within reach of Section 5 of the Voting Rights Act of 1965, as amended.

STATEMENT OF THE CASE

Prior to July 1, 1960, the City of Louisville, Mississippi, operated its Louisville Municipal Separate School District inside the City Limits of Louisville, and the Winston County School Board operated the County School System governing the territory outside the City of Louisville. On January 25, 1960, the Winston County Board of Education entered an order abolishing the Winston County School District requesting that its territory be added to and annexed to the Louisville Municipal Separate School District. The Board of Trustees of the Louisville Municipal Separate School District consented to the territory of the County School District being added and annexed to the Louisville Municipal Separate School District, which annexation was approved by the State Education Finance Commission on April 4, 1960, said Commission making a finding that such

abolition and annexation would promote the educational welfare of the entire county and the efficiency of operating schools therein. The City of Louisville reserved and retained the right, pursuant to applicable existing law, to appoint three members of the five-member Board of Trustees with two Trustees being elected at-large from the added territory, even though other alternate methods of the selection of Trustees were lawfully available.

Continuously from July 1, 1960, to date, the only school district operating public schools in Winston County has been denominated the Louisville Municipal Separate School District with the Board of Trustees of this School District appointed and elected in the manner aforesaid.

In 1964 the Mississippi Legislature enacted two statutes which affected the School District. One section, being §37-7-615, Mississippi Code of 1972, changed the method by which the taxable property within the added territory outside the municipal limits should be assessed. The other change, being §37-7-203, Mississippi Code of 1972, required all members of the Board of Trustees of the School District to be elected from Supervisors' Districts.

Immediately after the enactment of §37-7-615, Mississippi Code of 1972, a suit was instituted by the City of Louisville against the Board of Supervisors of Winston County, Mississippi, challenging the constitutionality of the change effected by §37-7-615.

The Chancery Court of Winston County, Mississippi, by decree dated September 16, 1964, declared that the said section was unconstitutional, since it was of a local and private nature and, therefore, violated the Constitution of the State of Mississippi. Although the municipality did not attack in court said §37-7-203 which concerns the change of the selection of the board members of

the District, the municipality was of the opinion that said section was unconstitutional for the reasons given by the Chancery Court and, therefore, did not implement the change effected by §37-7-203. Therefore, the members of the Board of Trustees of the Louisville Municipal Separate School District have continued to be selected in the same manner as they were selected in 1960.

In 1975 certain citizens residing outside the corporate limits of Louisville, Mississippi, filed an action in the Chancery Court of Winston County requesting a mandatory injunction to enforce the election of a five-member Board of Trustees for the Municipal Separate School District as provided by §37-7-203, Mississippi Code of 1972. The Chancellor entered a Decree dismissing the action determining that said §37-7-203 was unconstitutional, since it was of a local and private nature and, therefore, violative of the Constitution of Mississippi. The Chancellor further determined that the method of selecting members of the Board of Trustees was not in violation of the one-person one-vote principle.

The Plaintiffs appealed to the Supreme Court of Mississippi, and that Court reversed the Chancellor as to his declaration that §37-7-203 was unconstitutional. The Court did not address the question as to one-person one-vote.

Petitioners filed a Petition for Rehearing En Banc and raised the question as to the applicability of §5 of the Voting Rights Act of 1965, as amended. A copy of that portion of the Petition and brief in support thereof which addresses the §5 question is attached hereto as Appendix "B". Although the Supreme Court, in its opinion, did not specifically discuss the §5 question, the Court sub silentio rejected Petitioners' contention, since it remanded the case for entry of a decree by the Chancellor

without the need or necessity of §5 preclearance. The §5 question had not been previously raised, but, being akin to a jurisdictional question, could be raised at any stage of the litigation.

The Supreme Court remanded the case to the Chancellor directing him to enter a decree requiring the School Board members to be elected from Supervisors' Districts of Winston County, Mississippi. Therefore, in effect, the Chancery Court is now mandated to require the selection of members of the Board of Trustees of the Louisville Municipal Separate School District in a manner different from the manner of selection which existed as of November 1, 1964. Such is a violation of §5 of the Voting Rights Act of 1965, as amended, since the local school district has not obtained preclearance of such procedure from the Attorney General of the United States or the United States District Court for the District of Columbia.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted since the mandate of the Supreme Court of Mississippi requires the Chancery Court of Winston County, Mississippi to enter a decree requiring these Petitioners to violate §5 of the Voting Rights Act of 1965, as amended.

Petitioners submit that the change in the selection of members of the Board of Trustees of the Louisville Municipal Separate School District mandated by the Supreme Court of Mississippi is a "standard practice or procedure with respect to voting" within the meaning of §5 of the Voting Rights Act of 1965, as amended. This Court in *Dougherty County, Ga. Bd. of Ed.* v. *White,* ..... U.S. ....., 58 L.Ed.2d 269, surveyed prior cases of the Court wherein the question as to what type of changes in voting

procedures were covered by §5 and concluded that said section must be given a broad construction. This Court has repeatedly determined that the central concern of Congress in enacting §5 was to protect against changed practices which may affect Negro voters. This Court in *Dougherty* admonished that:

> "Thus, in determining if an enactment triggers §5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has *potential* for discrimination."

Petitioners submit that the change required by the decision of the Supreme Court of Mississippi has the potential for discrimination. This Court has previously determined that a change from an elected official to an appointed official is covered by the Act, *Allen* v. *Board of Education*, 393 U.S. 545, but has not had the occasion to determine whether a change from an appointed official to an elected official is covered by the Act. We submit that such change is covered. The United States District Court for the District of Columbia has so decided. *Horry Cty.* v. *United States*, 449 F.Supp. 990, 995 (1978). It takes little imagination to envision a situation by which Negro officials appointed by a City Council could not be elected if they had to face a voter constituency which was predominately of the Caucasian race. This Court is aware that many of the gains made by blacks in government, be it federal, state or local, have been through the appointive route.

The Attorney General of the United States has taken the position that a change in the selection of a public official in a covered state from the appointive method to the elective method is covered by §5. The Attorney General in developing procedures for the administration of §5 has determined that "any action. . . changing the method of selecting an official" is covered by the Act.

28 CFR §51.4(6).* This interpretation should be given consideration. *Udall* v. *Tallman*, 380 U.S. 1.

Petitioners further submit that the change from the election at-large of the two members who reside outside the corporate limits of Louisville, Mississippi, to election by Supervisors' Districts also has a potential of racial discrimination. Again, it is not difficult to conceive of a situation by which the two members, if elected at-large, would be black; if elected by Supervisors' Districts, one may be black representing an overwhelmingly black district, whereas the other member may be Caucasian coming from a predominately white district. This Court has previously determined that any change from at-large elections to district elections or the converse is covered by the Act. *Allen* v. *Board of Elections*, 393 U.S. 544.

The fact that the Mississippi statute which the Supreme Court of Mississippi has mandated the Chancery Court to require implemented was enacted prior to November 1, 1964, is of no moment. As previously stated, this statutory scheme of selecting members of the Board of Trustees of the local school district was never "administered" by the School District. On November 1, 1964, the members of the local school district were being selected in the same manner as they were selected in 1960, i.e. three members were appointed by the City Council and two members were elected at-large by the voters residing outside the corporate limits. This Court has previously held in *Perkins* v. *Matthews*, 400 U.S. 379, that the mere date of enactment of a statute is not controlling, but that the controlling date is that date when a covered political body "seeks to administer" the statute. In the action

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*The above-stated position of the Attorney General of the United States was confirmed by telephonic communication with the Chief of the Voting Section of the Attorney General of the United States.

sub judice the statute in question has never been administered and will not be administered until mandated by a decree of the Chancery Court of Winston County, Mississippi. Therefore, the local School District will be required "to administer" a voting procedure different from that existing on November 1, 1964.

This Court has previously declared that a decree of a United States District Court is not within the reach of §5 of the Voting Rights Act of 1965, as amended, *Connor* v. *Johnson*, 402 U.S. 690, 691; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, fn. 6, but has never addressed the question as to whether the decree of a covered state court is within the reach of §5. Petitioners suggest that a covered state court decree is within the reach of §5. Since Congress has determined that §5 questions should be adjudicated by a Three-Judge United States District Court, it would seem unlikely that a decree of a covered state court would not be subject to federal scrutiny, i.e. the Attorney General of the United States or United States District Court for the District of Columbia. The rationale for this Court's determination that the decree of a United States District Court is not subject to §5 scrutiny is based upon the principle of co-equal branches of the federal government. Such a determination is not necessary when the court is dealing with branches of two separate governments, one being paramount to the other. Again, it is the position of the United States that a decree of a covered state court is within the reach of §5. The Attorney General has taken the position that decrees of covered state courts approving municipal annexations are within the reach of §5.

Petitioners submit that this question, in and of itself, is of sufficient importance for this Court to grant the requested writ of certiorari. Immediately after the release

of the 1980 Census figures numerous local governments throughout the covered states will be required to redistrict in order to comply with the one-person one-vote principle. Many of the changes brought about by the 1980 Census will be commenced by litigation. These states need to have a definitive answer from this Court as to whether decrees of their respective state courts requiring redistricting are within the reach of §5. Further, it is not inconceivable that state court actions may be instituted in the covered states as to reapportionment of the State Legislatures and redistricting of the Congressional delegations. These states need guidance from this Court as to whether such actions, once finalized, must still receive clearance as provided for by §5.

CONCLUSION

Petitioners suggest that the Writ should issue since the Supreme Court of Mississippi decided a federal question in a way which conflicts with applicable decisions of this Court and interpretations of the Attorney General of the United States.

Further, the Mississippi Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court, i.e. whether a decree of a state court in a covered state is within the reach of §5 of the Voting Rights Act of 1965, as amended.

We submit to the Court that unless this Court issues the prayed for writ of certiorari and settles the important questions involved, the Petitioners will be placed in an untenable position of either the disobeyance of a state court injunction or the violation of a federal statute. It is here noted that the Supreme Court of Mississippi in its opinion not only reversed the Chancery Court, but

rendered judgment at the appellate level. This would appear to foreclose any consideration on remand by the Chancery Court of the applicability of §5 of the Voting Rights Act of 1965, as amended. It would appear that the Chancery Court is limited to the entrance of a decree requiring the Petitioners "to administer" a voting practice or procedure different from that which existed as of November 1, 1964, without preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia.

For the aforementioned reasons, Petitioners are of the opinion that the writ of certiorari should be granted and that the questions here involved should be decided by this Court as guidance for actions to be taken by governmental units in the covered states.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Mrs. Bobby LOVORN, Sammy Carter, Joe Goodin, J. D. Eaves and Prentiss Carter

v.

Ralph HATHORN, Mayor of Louisville, et al.

No. 49446.

Supreme Court of Mississippi.

Oct. 4, 1978.

As Corrected On Denial of Rehearing Jan. 10, 1979.

Action was brought against mayor and others seeking mandatory injunction to enforce election of five-member school board for municipal separate school district. The Chancery Court, Winston County, John C. Love, Jr., Chancellor, dismissed bill of complaint, and complainants appealed. The Supreme Court, Lee, J., held that provision of statute governing election of board of trustees in school district embracing entire county which read "in which Highways 14 and 15 intersect" was unconstitutional, although remaining portion of statute was constitutional as being rational and germane to subject matter.

Reversed, rendered and remanded.

Statutes (Key) 64(2), 96(4)

Portion of statute providing for election of board of trustees for school district embracing entire county which read "in which highways 14 and 15 intersect" was unconstitutional as violation of prohibition on local, private or special laws; however, with offending language stricken, remaining portion of statute was constitutional as being rational and germane to subject matter. Code 1972, § 37-7-203; Const.1890, § 90(p).

Laurel G. Weir, Philadelphia, for appellants.

Fair & Mayo, James Mayo, Louisville, William A. Allain, Jackson, Frank Deramus, Louisville, for appellees.

Sara E. Gallaspy, Jackson, amicus curiae brief for Mississippi Municipal Association.

En Banc.

LEE, Justice, for the Court:

Mrs. Bobby Lovorn, et al., filed their bill of complaint against Ralph Hathorn, Mayor of Louisville, et al., in the Chancery Court of Winston County, seeking a mandatory injunction to enforce the election of a five-member school board for the Louisville Municipal Separate School District. The chancellor entered a decree dismissing the bill and complainants below appeal and assign the following errors in the trial:

(1) The chancellor erred in holding Mississippi Code Annotated Section 37-7-203 (1972) to be unconstitutional.

(2) The chancellor erred in holding that the constitutional rights of appellant were not being violated under the one-man one-vote principle.

(3) The chancellor erred in amending his decree after an appeal had been perfected to the Mississippi Supreme Court.

Since July 1, 1960, Louisville Municipal Separate School District has covered all of Winston County and has been the only school district in said county. Twenty-six hundred seventy-five (2,675) pupils outside the Louisville city limits and fourteen hundred eighteen (1,418) pupils inside the city limits attend the schools of said district. The population of Winston County is approximately eighteen thousand four hundred six (18,406) of which number approximately seven thousand (7,000) live within the City of Louisville. Taxes in the school district are assessed and collected by the Louisville City Tax Assessor and Collector, and the school district has issued negotiable bonds for the purpose of funding construction and maintenance of the schools. School taxes collected inside the city amount to two hundred ninety-four thousand nine hundred sixty-four dollars three cents ($294,964.03) and said taxes collected outside the city amount to two hundred fifty-five thousand eight hundred twelve dollars twenty-four cents ($255,812.24). There are fifty-two (52) municipal separate school districts in Mississippi and at least forty-eight (48) such districts have territory located outside the municipality which is embraced within the school district.

Since 1960, the Board of Trustees of Louisville Municipal Separate School District has been composed of five (5) members, three (3) of which are appointed by the governing authorities of the City of Louisville, and two (2) of which are elected by the qualified electors of the school district outside the city. That part of Mississippi Code Annotated Section 37-7-203 (1972) as amended, which

applies to this suit provides: ". . . in any county in which a municipal separate school district embraces the entire county *in which Highways 14 and 15 intersect*, one (1) trustee shall be elected from each supervisors district." (Emphasis added).

It is not disputed that the underscored phrase applies only to Winston County. Appellants' suit was brought to enforce election of one (1) trustee from each supervisor's district. They also contend that the method of selecting trustees for said municipal separate school district violates the one-man one-vote rule and that the right of individuals residing outside the Louisville city limits to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The chancellor found the quoted part of the statute to be in violation of Section 90, Mississippi Constitution 1890, and unconstitutional. He also held that the one-man one-vote rule was inapplicable to the present case.

I.

Did the chancellor err in holding Mississippi Code Annotated Section 37-7-203 (1972), as amended, to be unconstitutional?

The basis of the chancellor's ruling is that the part of said statute referring to Highways 14 and 15 bears no rational relationship to the means of electing trustees in the school district, that it could not apply to any county except Winston County and that it is a local and private law in violation of Section 90(p), Mississippi Constitution 1890, which follows:

> "Section 90. The legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general law, viz:
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> * * *
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> (p) Providing for the management or support of any private or common school, incorporating the same or granting such school any privileges; . . ."

We held in *Wilson* v. *Jones County Board of Supervisors*, 342 So.2d 1293 (Miss.1977), where the statute under consideration involved levying an additional two-mill tax in a county having a population in excess of fifty-nine thousand five hundred forty (59,540) and being traversed by U. S. Highway 11 which intersected U. S. Highway 84 (Jones County), that the classification must bear a rational relationship to the purpose of the section. We said:

> "It is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect it would not have enacted the residue independently. [Citing cases].
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> . . . We are therefore led to the inescapable conclusion that the legislature would have enacted the valid part of the statute independently of the invalid part because this is precisely what it did. The invalid part of the statute may be separated from the valid part and stricken out leaving a complete and consistent plan whereby counties may levy additional

taxes for general county purposes. We therefore hold that the part of section 27-39-304 authorizing counties to levy additional taxes for general county purposes, and the part in the last paragraph prescribing the procedure to be followed in making the levy, are constitutional." 342 So.2d at 1296, 1297.

An act providing that a county having two judicial districts and being intersected by U. S. Highway 84 and Interstate 59 was held to be unconstitutional in *Smith* v. *Transcontinental Gas Pipeline Corporation,* 310 So.2d 281 (Miss.1975). It was emphasized that the classification must be germane to the subject matter of the legislation.

In *Vardaman* v. *McBee,* 198 Miss. 251, 21 So.2d 661 (1945), the Court stated:

> "Class legislation, also often called local or private legislation, is legislation limited in operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of the State, and statutes which make unreasonable or arbitrary classifications or discriminations violate provisions of Constitutions prohibiting special laws granting any special or exclusive privileges, immunities, or franchises, or passed for the benefit of individuals inconsistent with the general law of the land. 12 C.J., Sec. 855, p. 1128; 16A C.J.S. Constitutional Law § 489.
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> It is said in Ruling Case Law, 'Where a law is broad enough to reach every portion of the state and to embrace within its provision every person or thing distinguished by characteristics sufficiently marked and important to make them clearly a class by themseves, it is not a special or local, but a general, law, even though there may be but one member of the class or one place on which it operates." 198 Miss. at 260, 21 So.2d at 664.

The statute under consideration in *Board of Education* v. *Educational Finance Commission,* 243 Miss. 782, 138 So.2d 912 (1962), provided:

> " 'In cases involving two (2) counties, each of which is organized on the county-unit basis, where the students residing in one county have been attending and wish to continue attending the school situated in the adjoining county which children from their community have been attending for more than forty (40) years and where the county line lies within one thousand (1,000) yards of the school property, transfers may be granted for a period of time not to exceed five (5) years, subject to the approval of the two (2) respective county boards of education. In case the two (2) boards are unable to agree or in case there is a popular objection to the decision of the respective boards in the matter, appeals shall lie to the state educational finance commission whose decision shall be final.' " 243 Miss. at 804, 138 So.2d at 921.

In holding that the statute was not unconstitutional, the Court said:

> "The appellant Benton County Board of Education has invited the attention of this Court to the Mississippi Legislative House Journal of 1960 at page 388 in order to prove that the amendment here complained of was introduced by three representatives from Marshall County, Mr. Ash, Mrs. Slayden and Mr. Owen. It is further stated that the Court should take judicial knowledge of the enactment and says: 'There can be no question, but that this proviso was inserted for the sole and express purpose of taking care of the Potts Camp situation.' This may well

be true, but this Court has no right to assume such facts. The burden is upon one who attacks the constitutionality of a statute to show wherein it conflicts with the Constitution. We find the foregoing rule expressed in 11 Am.Jur. Constitutional Law, Sec. 132, p. 796, as follows: 'With regard to the duties cast upon the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.'

In the case of *State ex rel. Jordan, District Attorney* v. *Gilmer Grocery Co.*, 156 Miss. 99, 125 So. 710, at p. 714, this Court said: 'Our own Court is committed to the proposition that a statute should be so construed as to render its constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity.'

It was also pointed out in *State ex rel. Knox, Attorney General* v. *Speakes et al.*, 144 Miss. 125, 109 So. 129, that where the meaning of a provision in a statute is not ascertainable from the act itself, it cannot be enforced by the courts, and certainly courts cannot go outside of the amendment of 1960 in this case, and the record, to find some meaning by which the amendment may be declared unconstitutional.

> We are reminded by the language set out in 16 C.J.S. Constitutional Law § 151(1), p. 738, that: 'The power of the judiciary in determining the constitutionality of a statute is limited to deciding whether it is within the scope of the constitutional powers of the legislative department. The judiciary will interfere with acts of the legislative body only where they are beyond the bounds prescribed by the constitution, and a legislative usurpation of power should be clear, palpable, or oppressive, and the claimed infringement of the constitution must be real to justify interposition. Limitations on the power of the legislature which the people have been satisfied to leave to the judgment, patriotism, and sense of justice of the legislature are not within the control of the courts. It is for the legislature and not for the courts to determine what means shall be employed to accomplish ends within its constitutional powers, * * *'." 243 Miss. at 812-814, 138 So.2d at 925-926.

Absent the provision referring to Highways 14 and 15 intersecting, the statute, which is a general statute, appears to be constitutional. Even though Louisville Municipal Separate School District encompasses all territory of the county, there are statutory procedures whereby any other county in the state could become similarly situated. Without the offensive part of Section 37-7-203, the statute appears to be rational and germane to the subject matter.

We hold that the part of said statute under consideration here which reads "in which Highways 14 and 15 intersect" is unconstitutional, that such offensive language be stricken from the act and that the remaining portion of the statute is constitutional. We further hold that the chancellor erred in finding the entire portion of the statute

to be unconstitutional and the decree is reversed and judgment entered here on said question.

II.

Did the chancellor err in holding that the constitutional rights of appellants were not being violated under the one-man one-vote principle?

III.

Did the chancellor err in amending his decree after an appeal had been perfected to the Mississippi Supreme Court?

Appellants contend that their right to vote for trustees is being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment and that the one-man one-vote rule is applicable to the election of trustees for said school district. They cite *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), and *Hadley* v. *Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). In *Hadley*, the Supreme Court stated:

> "Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.
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> . . . Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor—these officials are elected by popular vote.
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> . . . If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the power of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.
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> It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' *Avery*, supra, 390 U.S. at 482,

88 S.Ct. at 1119, 20 L.Ed.2d at 52, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." 397 U.S. at 53-56, 90 S.Ct. at 794-795, 25 L.Ed.2d at 49-51.

Appellees argue that the one-man one-vote rule does not apply and, among other decisions, cite *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967), wherein the court said that the rule did not apply since the county school board members were elected by delegates from local school boards and that the function of said school board was administrative rather than legislative or governmental. The Court further stated:

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. Our cases have, in the main, dealt with elections for United States Senator or Congressman . . .
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> . . . If we assume arguendo that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray* v. *Sanders* [372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821] and *Reynolds* v. *Sims* [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506] must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy." 387 U.S. at 108, 111, 87 S.Ct. at 1552, 1553, 18 L.Ed.2d at 653, 655.

The selection process here is neither fish nor fowl, three members of the board being appointed in the city and two members being elected outside the city. However, since the decision on Question I decides this case, we do not reach the problem presented by the one-man one-vote rule, and it is not necessary that we pass on the second and third questions here. Suffice it to say, we call attention of the Bench, Bar and Legislature to the question (which we do not decide) presented by the one-man one-vote rule which may affect fifty-two (52) municipal separate school districts in the State of Mississippi.

After consideration of this case by a conference of justices en banc, and for the reasons stated, the decree of the trial court is reversed, judgment is rendered here for appellants, and the case is remanded to the chancery court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

PATTERSON, C. J. SMITH and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM and COFER, JJ. concur.

BOWLING, J., took no part.

APPENDIX "B"

4.

The decision of this Honorable Court contains an error of law in that the action by the Court in reversing the lower Court and remanding the Cause to the Chancery Court for further proceedings not inconsistent with the Opinion of the Court contravenes, and is inconsistent with and does not comply with the *Voting Rights Act of 1965*, Section 5, 42 U.S.C.A., Section 1973 C, in that at all times since July of 1960, the Trustees of the Louisville Municipal Separate School District have been elected in a consistent manner without change and for this Court by the decision handed down or by judicial legislation or any further procedure by this Court or the lower Court to change the method and manner of the election of the Trustees which existed prior to November 1, 1964, without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia, is as heretofore stated an error of law.

Since, at all times since 1960, the method and manner of the election and selection of the Board of Trustees of the Louisville Municipal Separate School District has been consistent, your Appellees-Petitioners herein would say that this Court or the lower Court is powerless to change or seek to administer a change in the method and manner of the election procedures of Winston County or the Louisville Municipal Separate School District without the approval of the Attorney General of the United States or the United States District Court for the District of Columbia because such action by this Court would be in conflict with the *Voting Rights Act of 1965*, Section 5, 42 U.S.C.A. Section 1973 C. The Supreme Court of the United

States in *Perkins* v. *Matthews*, 91 S. Ct. 431 (1971) held that any change in polling places or voting procedures by the City of Canton was within the meaning of Section 5 of the Voting Rights Act and requires compliance with same before implementing any change in election procedures. The Canton case in analogous to the Louisville Municipal Separate School case in that in 1962 the Legislature authorized a change to at-large elections but for some reason Canton ignored the mandate in the conduct of the 1965 municipal election and as in 1961, elected the Aldermen by wards. Canton contends in its argument that it had no choice but to comply with the 1962 Statute even though there was no attempt to change same until 1969 and after the Section 5 Voting Rights Act date of November 1, 1964. The reason for Canton's failure to conform its election law to state law does not appear in the record; however, on oral argument, Appellees' Counsel stated that the lapse was due to his overlooking the 1962 law and the Court held at page 440:

> "Consequently, we conclude that the procedure in fact "in force or effect" in Canton on November 1, 1964, was to elect Aldermen by wards. That sufficed to bring the 1969 change within Section 5. As was the case in *Allen*, it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when . . . [Canton] became subject to the act; . . . 393 U.S., at 570, 89 S.Ct. at 834. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide."

This case is exactly identical to the Canton case because even though the House Bill 655 was enacted at the regular 1964 Legislative Session and prior to November 1, 1964, the change does not purport to go into effect

until after and thus Section 5 of the Voting Rights Act must be complied with and, therefore, this Court or the Court below is powerless to order or administer a change in election procedures without complying with the Act. Therefore, the decision handed down by this Honorable Court contains an error of law.